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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 520

EDWIN M. RICKER AND WILLIAM O. McKAY, Co-partners Doing Business under the Firm Name and Style of EDW. M. RICKER AND CO.,

Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

HAROLD C. FAULKNER,
Counsel for Petitioner.

MELVIN, FAULKNER,
SHEEHAN AND WISEMAN,
F. WALTER FRENCH,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 520

EDWIN M. RICKER AND WILLIAM O. McKAY, Copartners Doing Business under the Firm Name and Style of EDW. M. RICKER AND CO.,

Petitioners,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable Earl Warren, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Edwin M. Ricker and William O. McKay, Copartners Doing Business Under the Firm Name and Style of Edw. M. Ricker & Co., petitioners and plaintiffs below, respectfully prays for a writ of certiorari to the United States Court of Claims to review the judgment of said Court entered in the above entitled case October 6, 1953.

A certified transcript of the record in said Court is furnished herewith pursuant to Rules 41 (1) and 38 (1) of this Court and Rule 57 of the Court of Claims.

1. Opinion, Judgment and Findings Below

The opinion sought to be reviewed is "Edwin M. Ricker, et al., v. United States, No. 49516, United States Court of Claims" (115 F. Supp. 193) in the record herein. (R. p. 13)

The Findings of Fact are in the Record. (R. p. 20)

2. Summary Statement of the Matter Involved

The case is a suit for just compensation for a vessel first sold by respondent to petitioners and later requisitioned by respondent from petitioners under the Merchant Marine Act of 1936, as amended.

The Court below decided that petitioners as owners of the hull of the ex-battleship Oregon were entitled to just compensation in the sum of $25,000.00.

The Court of Claims made alternate findings of value that the vessel at the time of requisition, "had a fair and reasonable value to plaintiffs for scrapping purposes of $25,000.00, and fair and reasonable value thereof for use as an unpropelled barge or store ship was $90,000.00." (Record p. 29)

The Court concluded that although the vessel was requisitioned for, and used as, an unpropelled barge or store ship, just compensation was limited, as a matter of law, to scrap value stating that, "what the plaintiffs lost was not a barge or an unpropelled vessel but the opportunity to dismantle and scrap the hull of the Oregon . . ." (*Ricker* v. *U. S.*, 115 F. Supp. 193 at 197).

Petitioners while urging error in limiting just compensation to scrap value do not question these findings of value or any finding of the Court of Claims. We submit a brief

chronological statement of the case in the language of the Court's Findings.

October 26, 1942 the President authorized the Navy "to turn the U.S.S. Oregon over to the War Production Board for reduction to scrap metal."

Following an invitation to plaintiff McKay to bid, a bid from plaintiffs and its acceptance, the parties entered into Contract No. N406S-4439. Paragraph 22 contained this provision:

> "If awarded to me/us, the vessel bid on will be scrapped at beyond the limits of the City of Portland and out of Oregon if possible. Scrapping will be completed within six months from date of delivery of the vessel by the Government.

Plaintiffs took possession and on February 18, 1943 leased docking facilities at Kalama, Washington.

> "Early in their operations in 1943, the plaintiffs determined to salvage the hull of the Oregon, and their dismantling operations were conducted without structurally impairing the hull as a non-propelled vessel or barge."

March 27, 1944 plaintiffs acting through a ship broker offered the vessel to the War Shipping Administration. In a letter the broker "described the Oregon hull as being in very good condition, suggested that it would make an excellent barge or store ship . . ."

April 7, 1944 plaintiffs were notified that the Administrator, "does hereby requisition title to and possession of the ex-battleship Oregon pursuant to Section 902 of the Merchant Marine Act of 1936 as amended."

"At the time of its requisition, the Oregon consisted of its double-bottomed steel hull with all sea valves and sea cocks in place, steel bulkheads and decks and all pipe and

equipment necessary to and relating to fire control and to ballast and pumping of the bilges. The steering engine and equipment remained, as did the 68 manholes, 163 watertight doors, 26 chocks and bitts, and 60 airports. * * * Her hold was entirely dry, and her general condition was that of a ten-year-old vessel * * *"

"The defendant had seven cargo hatches installed in the main deck, the vessel fitted with lights and storage batteries to meet steamboat inspection, and various adjustments and repairs made, all at the contract price of $6,952.79. Thereafter she was towed to Guam by the Navy. * * *"

March 16, 1945 plaintiffs filed their claim for compensation and on April 13, 1948 the United States Maritime Commission determined that $10,250.00 was just compensation. Plaintiffs rejected this and filed their petition in the Court of Claims.

Hearings were had before the Court's Commissioner in Seattle, (July 27, 1950 and March 30, 1951) San Francisco (August 1-3, 1950 and March 26-28, 1951) and Washington, D. C. (August 16-23, 1951).

September 29, 1952 the Commissioner filed his report in which he found "value for scrapping purposes of $15,000.00 and her fair and reasonable value for use as an unpropelled barge or store ship was $90,000.00."

After exceptions and briefs were filed the matter was argued, submitted and decided.

3. Jurisdiction

The judgment below was entered on October 6, 1953. A timely motion for rehearing was denied December 1, 1953. Jurisdiction of this Court is invoked under Sections 1255 (1) and 2101 (c) of Title 28 of the United States Code.

4. Relevant Parts of Statutes Involved

The statute involved is Section 902 of the Merchant Marine Act of 1936, as amended. (46 USCA 1242) In so far as pertinent, it provides that under emergency conditions proclaimed by the President:

> "* * * it shall be lawful for the Commission to requisition * * * any vessel or other watercraft owned by citizens of the United States * * * the owner thereof shall be paid just compensation for the property taken * * *"

5. The Questions Presented

Petitioners present the sole question whether it was error for the Court of Claims to decide that just compensation under the Fifth Amendment was limited to $25,000.00 scrap value after finding that the reasonable value of the hull as an unpropelled barge or store ship was $90,000.00.

Petitioners submit that the judgment was erroneous for the following reasons:

1. That plaintiffs, as owners and claimants, were entitled to just compensation in the sum of $90,000.00 found by the Court of Claims to be the fair and reasonable value to plaintiffs of the hull of the ex-battleship Oregon for use as an unpropelled barge or store ship at the time defendant requisitioned title and possession of the vessel under Section 902 of the Merchant Marine Act of 1936 as amended.

2. Having found that $90,000.00 was the fair and reasonable value of the hull of the Oregon for use as an unpropelled barge or store ship when requisitioned in April, 1944 it was error to fail to enter judgment for plaintiffs in that amount.

3. That it was further error for the Court of Claims to decide that just compensation was limited to $25,000.00

which the Court found to be the fair and reasonable value of the hull for scrapping purposes, in which decision the Court failed to fix just compensation by applying the established principles that value is to be fixed, in view of all available uses or the most advantageous uses to which the property can be applied and erroneously determined that the terms of the contract of sale for scrapping purposes, from the Navy Department to plaintiffs, constituted a restriction which fixed and limited value of the property as scrap despite its requisition by the defendant as a vessel for subsequent use as an unpropelled barge or store ship.

6. Reasons Relied On for Allowance of the Writ

This case presents an important question of Constitutional law in the determination of just compensation under the Fifth Amendment in the constantly expanding field of condemnation or requisition in the many situations where property sold or leased by one governmental agency to an individual is subsequently taken for a public use by another governmental agency.

Due to the diversity and increasing number of governmental agencies and political subdivisions exercising the power of eminent domain it is imperative for both the government and individuals who may acquire property from the government which is subsequently condemned or requistioned to have a ruling from this Court determining whether in such cases just compensation is to be applied under the general principles used by this Court basing just compensation on the highest and most profitable use for which the property is adaptable and needed or is to be limited by the contract or grant under which the owner received the property from a governmental agency.

The Court of Claims recognized that in this case just compensation could be either of two values, one, the $90,-

000.00 value of the hull for use as an unpropelled barge, the other, the $25,000.00 scrap value, dependent on whether the owner's right to just compensation is determined under general principles applicable to the taking of private property for public use or is limited by any conditions in the contract under which it was acquired.

The decision of the Court of Claims is in direct conflict with *United States* v. *Douglas*, 9 Cir., 207 F. 2d 381, decided October 9, 1953 which opinion was not available when this matter was decided or upon the filing of motion for rehearing.

While this case is discussed in Petitioners' Brief we quote one paragraph of the syllabus to illustrate the conflict and importance of the question.

> "The Court of Appeals, Pope, Circuit Judge, held that, where owner of condemned land had previously signed contract, in accordance with irrigation project, not to sell such land for consideration exceeding value at which it was appraised by Secretary of Interior until five years after water had become available, but owner could have expected to use such land as irrigated land about three years after date of taking, such appraised value, which was based on value of land in its raw, dry state, did not constitute either market value or just compensation for the taking."

Concerning the statutory and contractual limitation that an owner could not sell for five years after water was available except at a price fixed by the Secretary of the Interior the Court said:

> "But when Douglas signed such a contract it created a limitation on sale which was personal to him. It had nothing whatever to do with what a willing buyer might have offered. As a practical matter, this restriction against his sale, resembled those restrictions which would have prevented sale by him if he were an infant or otherwise incompetent."

The same conclusion was reached on similar facts in the Second Circuit.

Westchester County Park Commission v. *United States,* 2 Cir., 143 F. 2d 688

A County received property from the State which it could not sell without the consent of the State at the time the property was condemned by the United States. Deciding that this limitation was irrelevant in determining just compensation the Court said:

> "Nor is it relevant that the County, without authorization by the State, could not sell; we must regard the situation as if it could, as if the property were being voluntarily sold by a seller free to do so."

The conflict in the reasoning and rationale of these cases and the conclusion reached by the Court of Claims is apparent in one sentence from the opinion:

> "We hold, therefore, that what the plaintiffs lost was not a barge or an unpropelled vessel but the opportunity to dismantle and scrap the hull of the Oregon and dispose of its various segments as either scrap or salvage items."

It is vital in our opinion that the substantial question involved in this and the cited cases be decided finally by this Court for the reason, among others, that many situations will arise where the Government or other public agencies may have contractual rights under which they might elect to recover property previously disposed of without recourse to condemnation if just compensation in a particular situation as defined in the Douglas case appears to involve duplicitous repurchase. Likewise the owners of property who acquire it from the Government or any other public body are entitled to know whether in the event it is taken for a public use just compensation will be its value in view of all available uses and "the highest and most profitable

use for which it is adaptable and needed'' under the Douglas case and the decisions of this Court upon which it relies or a much lesser value such as scrap value under the Ricker decision.

The actual practical effect of the decision in this case is to permit and encourage public agencies to sell or dispose of property for one purpose and when changing conditions make the same property more valuable for a different use take it away from the owner without obeying the plain mandate of the Constitution that private property shall not be taken for public use without just compensation.

We realize that it is the effect of a decision upon the law which invites certiorari and not the immediate result, but the fact remains that in this case solely the wisdom of petitioners in dismantling the Oregon ''without structurally impairing the hull'' made it possible for the Government to requisition a vessel worth $90,000.00 which upon the expenditure of $6,952.70 took the place of unpropelled barges it was constructing ''at costs ranging from $578,000.00 to $1,326,000.00'' for which the Court of Claims sanctions payment at scrap value.

WHEREFORE, petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Claims, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Claims in the case numbered and entitled on its docket No. 49516, Edwin M. Ricker and William O. McKay, Copartners Doing Business Under The Firm Name And Style Of Edw. M. Ricker & Co. v. The United States, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that

the judgment of said Court of Claims be reversed by this Court, and for such other and further relief as may be proper.

By HAROLD C. FAULKNER,
Counsel for Petitioners.

F. WALTER FRENCH,
MELVIN, FAULKNER,
SHEEHAN AND
WISEMAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

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No. 520

EDWIN M. RICKER AND WILLIAM O. McKAY, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF EDW. M. RICKER & CO.,

Petitioners,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Certiorari Has Been Allowed Consistently to Review Novel Applications of Just Compensation or to Resolve Conflict in Eminent Domain Cases Including the Requisition of Vessels.

U. S. v. *Toronto, Hamilton & Buffalo Nav. Co.*, 338 U. S. 396, 70 S. Ct. 217

"We brought the case here on certiorari because it presents problems of difficulty and importance in the practical

application of the general standard of just compensation * * *"

U. S. v. *Cors*, 337 U. S. 325, 69 S. Ct. 1086

"The importance of that decision (75 F. Supp. 235) in the settlement of claims arising as a result of the requisitioning program during the period of recent hostilities led us to grant the petition for certiorari."

U. S. v. *Westinghouse Electric & Mfg. Co.*, 339 U. S. 261, 70 S. Ct. 644

"The need for clarification led us to bring the case here."

Kimball Laundry Co. v. *U. S.*, 338 US1, 69 S. Ct. 1434

"* * * we granted the Laundry's petition for certiorari because it raised novel and serious questions in determining what is 'just compensation' under the Fifth Amendment."

U. S. v. *Dickinson*, 331 U. S. 745, 67 S. Ct. 1382

"We granted certiorari because important questions were raised relevant to the determination of just compensation for the taking of private property by the Government."

Albrecht v. *U. S.*, 329 U. S. 599, 67 S. Ct. 606

"Because of the apparent conflict presented and because the question is of widespread importance, we granted certiorari."

U. S. v. *Carmack*, 329 U. S. 230, 67 S. Ct. 252

"Because of the importance of the construction of the statutes authorizing the condemnation of land for federal uses, we granted certiorari."

U. S. v. *Petty Motor Co.*, 327 U. S. 372, 66 S. Ct. 596

"As this issue presents an important phase of the law of eminent domain we granted certiorari."

U. S. v. *Certain Parcels of Land*, 345 U. S. 344, 73 S. Ct. 693

U. S. v. *Pewee Coal Co.*, 341 U. S. 114, 71 S. Ct. 670

U. S. v. *Commodities Trading Corporation*, 339 U. S. 121, 70 S. Ct. 547

U. S. v. *Kansas City Life Ins. Co.*, 339 U. S. 799, 70 S. Ct. 885

U. S. v. *Gerlach Live Stock Co.*, 339 U. S. 725, 70 S. Ct. 955

U. S. v. *Thayer-West Point Hotel Co.*, 329 U. S. 585, 67 S. Ct. 398

Many earlier cases could be cited consistent with the foregoing.

II

The Precise Question in This Case Is One of First Impression in the Court of Claims and Has Been Before the Court of Appeals on Only Two Occasions.

Does the acquisition of property from the government for a specific purpose, limiting the owner's absolute right of disposition, establish or affect "just compensation" upon the subsequent condemnation of the property by another Federal agency?

Our research discloses only three decisions including the present case in which this question has been before the courts.

Westchester County Parks Commission v. *U. S.*, 2 Cir., 143 F. 2d 688 (June 5, 1944);

Ricker v. *U. S.*, Ct. of Claims, 115 F. Supp. 193 (October 6, 1953);

U. S. v. *Douglas*, 9 Cir., 207 F. 2d 381 (October 9, 1953).

In these three closely analogous, if not identical factual situations, the Courts of Appeals answered this question in the negative while the reply of the Court of Claims in the present case is in the affirmative.

Factual analysis establishes the identity of the question presented in each case.

In *U. S.* v. *Douglas, supra,* the defendant acquired land from the Government in the Columbia Basin Project, which was later condemned for use by the Atomic Energy Commission. In that case the Court of Appeals makes this statement of the condition upon which Douglas acquired the land:

> "* * * The Act which authorized the project's construction required the owners of each farm unit as a condition precedent to receiving water from the project to execute a contract providing that such land owner should not until five years after water became available for such unit, sell or convey his land for a consideration exceeding the value at which it was appraised by the Secretary of the Interior. * * *
>
> "Upon the trial, in the district court, of the issue of the amount of compensation to be fixed for the taking of the Douglas tract, the United States contended that the amount awarded could not exceed this appraised value since Douglas could not have sold his land for any greater amount at the time of the taking. This is the sole question presented on this appeal. * * *"
> (207 F. 2d 382)

In the case of *Westchester County Parks Commission* v. *U. S., supra,* the County through mesne conveyances acquired certain park lands upon condition that they could only be sold with consent of the State of New York. Subsequently the United States condemned the property for use as a parking lot for government vehicles at adjacent Fort Slocum.

In the present case, these petitioners purchased the ex-battleship Oregon under Presidential authorization for scrapping upon the express agreement that it be reduced to scrap and salvage items within six months.

In none of these three cases did the owner of the property have the unqualified right to dispose of it to anyone, at any price, for any purpose.

Although in the Court of Claims petitioners earnestly contended that, since the contract made their right of classification of salvage or scrap final, they were entitled to sell the hull as an unpropelled vessel, it may be conceded for the purpose of this petition and to present our position in the light most favorable to the Government, that in each case the owner could not have sold the property for the purpose for which it was condemned.

The Douglas land was part of the farm lands in an irrigation project, Westchester County held title for public park purposes and petitioners acquired the Oregon for the sole purpose of reduction to scrap and salvage items.

The exact parallel persists and culminates in the taking of the property in each case by the Government for a new and different public use; the Douglas realty for the Atomic Energy Commission's plant; the Westchester County Park for the use of adjacent Fort Slocum; and the partially dismantled but structurally intact and seaworthy hull of the Oregon, to be towed by the Navy to Guam as a store ship.

At this point the positive parallel ends in sharp divergence and irreconcilable conflict.

The Courts of Appeals in the Second and Ninth Circuits fixed just compensation under the pertinent decisions of this Court disregarding any limitation imposed by grant or contract which impaired the property's vendibility by the owner.

Circuit Judges Learned Hand, Thomas W. Swan and Jerome N. Frank concurred in this statement in *Westchester County Parks Commissioner* v. *U. S., supra.*

> "Nor is it relevant that the County, without authorization by the State could not sell; we must regard the situation as if it could, as if the property were being voluntarily sold by a seller free to do so." (143 F. 2d 692)

In *U. S.* v. *Douglas,* supra, Circuit Judges William Healy, Homer T. Bone and Walter L. Pope joined in this approval of the Second Circuit decision.

> "We think that the correct principle to be applied here is that stated in Westchester County, etc. v. U. S. * * *" (207 F. 2d 384)

Rejecting the Government's contention that the contract of purchase limited just compensation to the $8.00 an acre appraisal by the Secretary of the Interior and approving the award of $57.50 an acre the court disposed of the contract provision in the Ninth Circuit case as follows:

> "But when Douglas signed such a contract it created a limitation on sale which was personal to him. It had nothing whatever to do with what a willing buyer might have offered." (207 F. 2d 385)

In contrast in the present case, the Court of Claims after finding that the hull of the Oregon was inexpensively converted into an unpropelled barge of the reasonable value of $90,000.00 concluded that only $25,000.00 scrap value, could be awarded under the terms of the contract of sale.

> "We hold, therefore, that under the contract of sale of January 23, 1943, what the plaintiffs lost was not a barge or an unpropelled vessel but the opportunity to dismantle and scrap the hull of the Oregon and dispose

of its various segments as either scrap or salvage items." (115 F. Supp. 193)

We submit that this conflict should be determined. This Court should allow certiorari so that whichever is the correct principle will be applied in the many situations which will arise involving the requisition or condemnation of private property for public use, which was acquired from a public agency for one purpose only to be subsequently taken for another public use.

We have been informed that the Government is seeking certiorari to review *U. S.* v. *Douglas,* 207 F. 2d 381, in which case the argument advanced by the Government in this case and upheld by the Court of Claims was rejected. Accordingly, it is respectfully suggested that the applications be considered in relation to each other.

III

Where a Decision of the Court of Claims Is in Direct Conflict With That of a Court of Appeals, That, in Itself Is Sufficient Ground to Grant the Writ of Certiorari.

Cahn v. *U. S.*, 297 U. S. 691, 56 S. Ct. 384
U. S. v. *Benedict,* 338 U. S. 692, 70 S. Ct. 472
Robertson & Kirkham Jurisdiction of the Supreme Court of the United States (1951 Edition) p. 720, section 362 and cases there cited.

IV

The Property Requisitioned Was a Vessel or Watercraft and Just Compensation Is Its Value as Such and Not Scrap Value.

Section 902 of the Merchant Marine Act of 1936, as amended (46 U. S. C. A. 1242) follows in part.

" * * * it shall be lawful for the Commissioner to requisition * * * any vessel or other watercraft owned

> by citizens of the United States * * * the owner thereof shall be paid just compensation for the property taken."

The statute poses what Mr. Justice Clark has called "elusive questions of property valuation". (U. S. v. Toronto, Hamilton & Buffalo Nav. Co., supra)

The Court of Claims resolved those questions by finding two values, first, $90,000.00 as an unpropelled barge and, second $25,000.00 for scrapping.

The Court of Claims erroneously concluded that the contract of January 23, 1943, under which the Navy sold the ex-battleship for reduction to scrap changed the character of the property requisitioned as a vessel on April 19, 1944.

Regardless of the effect of the contract of sale upon petitioners' title, when the property was requisitioned it was for all purposes a vessel and must be paid for as such. To fix just compensation at scrap value is to do violence to the plain provisions of the statute.

Although the Government has offered scrap value in requisition cases and it has been discussed in the decisions it has been rejected by the courts as a criterion of value.

> *U. S.* v. *Toronto, Hamilton, etc.*, supra, after remand to the Court of Claims, 88 F. Supp. 1016.

The Government requisitioned an automobile ferry and offered $72,500.00 as just compensation. The Court of Claims awarded $142,500.00 following a first award of $161,833.72. (81 F. Supp. 237).

The disparity between scrap value and these figures is shown in this quotation from the opinion of Mr. Justice Clark.

> "Her insured valuation in 1942 was $100,000.00; her scrap value $13,500.00." (70 S. Ct. 219)

Broadfoot v. *United States*, 82 F. Supp. 514

This case involves presidential yacht Mayflower. Following damage by fire the Navy sold the vessel for $16,500.00. She was later requisitioned and the Court of Claims awarded $30,000.00. Following requisition and after spending $1,200,000.00 reconditioning her she was again sold for $20,159.99. The incongruity of scrape value is illustrated in this quotation.

> "The War Shipping Administrator determined that the vessel had only scrap value and that just compensation for her taking was the sum of $12,670.00".

Pontin Boat Corporation v. *U. S.*, 89 F. Supp. 685

Following requisition the Government offered $25,000.00 and the Court of Claims awarded $46,245.00. Scrap value was $10,500.00.

The foregoing cases show that only a vessel can be requisitioned under the statute and the present case fixing scrap value as just compensation is in conflict with these cases.

Conclusion

It is respectfully submitted that the writ of certiorari should issue to the Court of Claims for the reasons that the petition discloses the following:

1. An important question in determining "just compensation" under the Fifth Amendment is involved.
2. Construction of the statute authorizing requisition of vessels is required to secure uniformity in Court of Claims decisions fixing value.
3. Novel questions concerning the sale of public property by one branch of the Government to individuals and its subsequent requisition or condemnation by another federal agency are raised.

4. The present case is in direct conflict with the only two decisions upon the precise question involved, namely whether one who receives property from the Government with a limitation upon its voluntary transfer or use is entitled to receive just compensation upon its later condemnation without reference to such impairment of vendibility or is restricted to some arbitrary value which in the present case is far less than the value of the vessel as found by the Court of Claims for the purpose for which it was taken and used.

Respectfully submitted,

HAROLD C. FAULKNER,
Counsel for Petitioners.

F. WALTER FRENCH,
MELVIN, FAULKNER, SHEEHAN AND WISEMAN,
Of Counsel

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 520

EDWIN M. RICKER AND WILLIAM O. McKAY, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF EDW. M. RICKER AND CO., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 13-20) is reported at 115 F. Supp. 193.

JURISDICTION

The Court of Claims entered judgment on October 6, 1953, and denied the plaintiffs' motion for rehearing on December 1, 1953. The plaintiffs filed a petition for a writ of certiorari on January 4, 1954, and invoked the jurisdiction of this Court under 28 U.S.C. 1255(1) and 2101(c).

QUESTION PRESENTED

Whether the United States is liable for more than the scrap value of a vessel when it requisitions a ship which it had previously sold to the owner under a contract requiring that the vessel be scrapped, and then after requisition uses the ship as an unpropelled barge or store ship.

STATUTES INVOLVED

The pertinent provisions of the statutes governing the sale of naval vessels and the requisition of ships by the War Shipping Administration are set forth in the Appendix, *infra,* pp. 7-8.

STATEMENT

On October 26, 1942, the President of the United States authorized the Navy "to turn the U.S.S. OREGON over to the War Production Board for reduction to scrap metal" (R. 20). At first, bids on the ship were generally advertised for, but when all received contained unacceptable qualifications (R. 16) it was decided, because of the vessel's "inestimable sentimental value", to invite only a selected group of contractors to bid "upon the wrecking of the ship" (R. 20). The petitioners' bid was accepted and they were notified that "approval for the sale of the *Oregon* to your partnership for the purpose of scrapping has been granted by the President of the United States." (R. 21). The petitioners, pursuant to the contract which provided that "scrapping will be completed within six months", removed the ship from Portland, Oregon, to Kalama, Washington, and began dismantle-

ment. Discovering that the hull of the vessel was still in good condition, the petitioners so conducted their scrapping operations that the superstructure, engines, guns, etc., were cleared away but the hull was left intact (R. 23). On March 27, 1944, the petitioners, through a ship broker, advised the War Shipping Administration that the hull was available as barge, store ship, or tanker (R. 24). The War Shipping Administration requisitioned the hull, effective April 19, 1944, pursuant to Section 902 of the Merchant Marine Act of 1936, as amended (46 U.S.C. 1242) (*infra*, p. 7) (R. 24). After slight refitting the hull was towed to Guam and there was in use as an unpropelled barge or store ship, at the time of trial (R. 25).

The Court of Claims found that the fair and reasonable value of the hull to the petitioners at the time of requisition was $90,000 for use as an unpropelled barge or store ship, or $25,000 for scrapping purposes (R. 29). The Court held that the latter figure represented just compensation (R. 30).

ARGUMENT

1. The Court of Claims correctly awarded compensation to the petitioners for the only interest they ever had in the *Oregon*: the right to wreck her and sell her for scrap. It is what the owner loses and not what the taker gains that determines the maximum measure of just compensation. *United States* v. *Miller*, 317 U.S. 369; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 80; *Boston Chamber of Commerce* v. *Boston*, 217

U.S. 189, 195. The petitioners concede for their purpose here that they could not have sold the *Oregon* other than as scrap, and it is equally clear that they themselves could have made no other use of it.[1]

The situation resembles the Government condemnation of property which in the hands of the prior owner had been dedicated to a particular use. *Mayor and Council of the City of Baltimore* v. *United States*, 147 F. 2d 786 (C.A. 4) (dedicated to highway purposes); *People of Puerto Rico* v. *United States*, 132 F. 2d 220 (C.A. 1) (dedicated to non-profit use). In such cases the United States takes free of the restrictions, but the owner is compensated only for the value of the land with the limitations attached.[2]

The petitioners suggest that inasmuch as the Merchant Marine Act in terms authorized the requisition of "any vessel or watercraft," the Government must have considered that it was taking the

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[1] Even if the contract of sale had provided otherwise, only a sale for scrapping was authorized by the President, by statute the sole person empowered to approve a deviation from the open bidding required by 34 U.S.C. 492. Congress alone has the power to control and dispose of the property of the United States (Constitution, Art. IV, § 3, cl. 2; *United States* v. *Allegheny County*, 322 U.S. 174; *Osborne* v. *United States*, 145 F. 2d 892 (C.A. 9)), and it may impose such conditions as it chooses upon the disposition. *United States* v. *San Francisco*, 310 U.S. 16, 29-30; *Fed. Power Comm.* v. *Idaho Power Co.*, 344 U.S. 17, 21; *McClung* v. *Silliman*, 6 Wheat. 598, 603.

[2] Where the continued use of the property for the dedicated purpose is required by a prior conveyance, some compensation may be due to the conveyor who imposed the condition. *People of Puerto Rico* v. *United States*, 132 F. 2d 220. But this problem does not arise here, since the United States itself made the restricted conveyance.

Oregon as a ship and not as a quantity of scrap (Pet. 17-19). Certainly the United States took a ship here, just as in the *Baltimore* and *Puerto Rico* cases it took land. The issue, however, is not the abstract value of the vessel, but the value of the petitioners' interest in it. For that interest they have been fully compensated.

2. The petitioners contend that this decision is in conflict with *United States* v. *Douglas*, 207 F. 2d 381 (C.A. 9). The Government's position with respect to that case is set out in our Petition for Certiorari now pending before this Court, No. 567, this Term. It is sufficient to distinguish that decision that the instant case involves no question of retention value, or other speculation as to future worth, or of enhancement in value attributable to a government project. There is no dispute over the *Oregon's* value as an unpropelled vessel or its value as scrap. The issue is solely whether compensation is to be awarded for an interest in the ship which the petitioners at no time would possess.

Speculative elements also distinguish *Westchester County Park Commission* v. *United States*, 143 F. 2d 688 (C.A. 2), in which the petitioners attempt to find a conflict with the instant case. For the county, like a minor or other incompetent landowner, could not sell the property involved without another's (the state's) consent, and the court refused to speculate on the likelihood of that consent ever being given. But no question of the county's fee interest in the land was involved; nor in those cases which the petitioners cite (Pet. 18-19) as

having rejected scrap value as a measure of compensation for a vessel was there ever any doubt of the owner's unrestricted interest in the ships and unrestricted right to use them as they pleased.

3. The decision in this case by the Court of Claims raises no new or unanswered question in the area of eminent domain, and it is not in conflict with the decisions of this Court or any other. Rather, the court below has properly applied to this matter the long-standing rule that it is what the owner loses, and not what the taker gains, that fixes the maximum limit of just compensation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General,
WARREN E. BURGER,
Assistant Attorney General,
SAMUEL D. SLADE,
JOHN J. COUND,
Attorneys.

FEBRUARY 1954.

APPENDIX

The pertinent portion of Section 902 of the Merchant Marine Act of 1936, 49 Stat. 2015, as amended, 53 Stat. 1255, authorizing the requisition of vessels, appears in 46 U.S.C. 1242 as follows:

> Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. * * * When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use.

The pertinent part of the authority to sell naval vessels stricken from the register, in effect at the time of the sale of the *Oregon,* appears at 22 Stat. 599, 34 U.S.C. 492, as follows:

> It shall be the duty of the Secretary of the Navy to cause to be appraised, in such manner as may seem best, all vessels of the Navy which have been stricken from the Navy Register under the provisions of the act making appropriations for the naval service for the fiscal

year ending June thirtieth, eighteen hundred and eighty-three and for other purposes, approved August fifth, eighteen hundred and eighty-two. And if the said Secretary shall deem it for the best interest of the United States to sell any such vessel or vessels, he shall, after such appraisal, advertise for sealed proposals for the purchase of the same, for a period not less than three months, in such newspapers as other naval advertisements are published, setting forth the name and location and the appraised value of such vessel, and that the same will be sold, for cash, to the person or persons or corporation or corporations offering the highest price therefor above the appraised value thereof; * * * But no vessel of the Navy shall hereafter be sold in any other manner than herein provided, or for less than such appraised value, unless the President of the United States shall otherwise direct in writing.

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